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CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

9:15 am, Feb 02, 2021

U.S. DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
LONG ISLAND OFFICE

UNITED STATES OF AMERICA, . Criminal No. 13-cr-00607-JFB-AYS

.
Vs. . 100 Federal Plaza
. Central Islip, NY 11722
PHILLIP A. KENNER, .
TOMMY C. CONSTANTINE . DATE January 29, 2021
.

TRANSCRIPT OF TELEPHONIC HEARING
BEFORE HONORABLE JOSEPH F. BIANCO
UNITED STATES VISITING JUDGE

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***Transcriber note: Static and background noise on phone connection, some inaudibles in transcript.

1 THE CLERK: Calling case number 13-Criminal-607,
2 United States of America Phillip A. Kenner and Tommy C.
3 Constantine. Counsels, please state your appearances for the
4 record.

5 MS. O'CONNOR: Good afternoon, Your Honor, this is
6 the US Attorney, Madeline O'Connor, for the United States.
7 Also appearing for the United States is Attorney Diane
8 Leonardo.

9 THE COURT: Good afternoon.

10 MS. KOSTOLAMPROS: Good afternoon, George
11 Kostolampros of Venable, and I'm here with colleague, Xochitl
12 Strohbehn, Doreen Martin and Kelly Weiner.

13 THE COURT: Good afternoon.

14 MS. RAMACHANDRAN: Good afternoon, Your Honor, this
15 is Seetha Ramachandran for Owen Nolan, I'm from the law firm of
16 Proskauer Rose.

17 THE COURT: Good afternoon.

18 MR. BRISSENDEN: Good afternoon, Your Honor, Matthew
19 Brissenden, standby counsel for Phillip Kenner.

20 THE COURT: Good afternoon.

21 MR. MAIN: Your Honor, this is Steve Main on behalf
22 of CSL Properties 2006.

23 THE COURT: Okay, good afternoon.

24 MR. TALKIN: Your Honor, this is San Talkin for Mr.
25 Constantine. I was contacted by the Court, but I'm not sure

1 that Mr. Constantine or my presence is necessary. I didn't
2 know if something came up or if this is a continuation of the
3 other litigation that we haven't been involved in for some time
4 now.

5 THE COURT: I don't think you need to be present. I
6 think we just give you notification just case you and/or Mr.
7 Constantine had some interest in participating. But I'm
8 certainly, I wasn't expecting you to be on the line.

9 MR. TALKIN: Okay, great, my office got a call, so I
10 thought I was missing something. I'm going to -- if it's okay
11 with the Court, I'm going to sign off. Thank you, Your Honor.

12 THE COURT: Yes. Well actually before you sign off.

13 MR. TALKIN: Yes.

14 THE COURT: Because we have the Government on the
15 line, I was going to issue an order on this. But since the
16 Government is on the line, it would save me time. I know we
17 don't have the criminal AUSA, but Ms. O'Connor, if you could
18 just pass along to the other AUSAs, Mr. Talkin put in a motion
19 for bail pending appeal on behalf of his client. And I want
20 the Government obviously to respond to that, maybe a week from
21 today.

22 MS. O'CONNOR: I'll relay the message, Your Honor.

23 THE COURT: All right. And Mr. Talkin, on that issue,
24 let me just ask you, because I don't remember seeing this in
25 the letter, has your client -- the facility been designated?

1 Has he received a designation yet?

2 MR. TALKIN: I have not, and we're in probably day in
3 the 60s. What I'll do is, by the time they reply I'll keep
4 working on them for an answer on that. I think what happened
5 was, there was two things. The marshals didn't get the
6 judgment. And second of all, I changed, remember I changed the
7 request for the facility. And I think those two things might
8 have delayed things. But I'll follow-up.

9 THE COURT: All right, thank you. All right, thank
10 you, Mr. Talkin.

11 MR. TALKIN: Thank you, I'll talk to you.

12 MR. SKOVGAART: Another appearance, Your Honor, Barry
13 Skovgaard, attorney here today on behalf of the homeowners, as
14 well as an owner at Diamante.

15 THE COURT: Yes, good afternoon.

16 MR. SKOVGAART: Good afternoon.

17 MR. SOUTHER: Good afternoon, Your Honor, Tom Souther
18 on behalf of Mr. Jowdy and the resort.

19 THE COURT: Good afternoon.

20 MR. MULRY: Kevin Mulry from Farrell Fritz, also on
21 behalf of Mr. Jowdy and the resort. Good afternoon, Your
22 Honor.

23 THE COURT: Good afternoon. All right, I think that's
24 everybody. So, as you know we scheduled this to address the
25 submissions that the Court requested following our last

1 conference. I have received all those, I'm not going to go
2 through each one of them. But obviously I received the
3 opposition that was expected from Mr. Nolan and CSL regarding
4 the Bank's summary judgment motion and their argument regarding
5 a constructive trust. I received the Government's letter that
6 I requested for January 15th. And I received Mr. Kostolampros'
7 responses to those submissions.

8 So what I want to focus on -- obviously the bulk, the
9 purpose and part from the last conference of the supplemental
10 submissions was, I asked the Government to advise the Court, it
11 was the Bank's position based upon the Court's rulings on the
12 matter that the Court believed could be decided based upon the
13 evidence in the record, the uncontroverted evidence in the
14 record. It was the Bank's view that it had an undisputed claim
15 of at least 176 million, had a superior interest in the amount
16 of at least 176.3 million, or at a minimum of \$164.2 million.
17 And in light of that position, I guess, and their argument that
18 they believed that based upon the equity left in the property,
19 that the Court's discovery on the remaining -- if that indeed
20 was the amount, that the Court's discovery that the Court was
21 going to allow the Government to have with respect to the
22 additional loans, would become essentially moot. And that the
23 Government might not even be interested then in being involved
24 in any type of forfeiture, because it would not yield any
25 additional money for forfeiture purposes.

1 So that was why the Court then allowed this
2 supplemental submission, and the Government respond to that.
3 And to see if in fact the Court could determine an amount. And
4 I will note, before I get to that issue, there was a back and
5 forth, and I think Mr. Nolan's counsel had advised the Court,
6 had asked for an extension, and advised the Court there are
7 ongoing settlement discussions. And there was a back and forth
8 on that. And a concern that the Court would potentially, Mr.
9 Wolinsky's letter addressed this as well, would potentially
10 hold off a ruling so as not to disturb the ongoing settlement
11 discussions.

12 I just wanted to emphasize and make absolutely clear
13 that that is not my view of what the Court should do in these
14 types of situations. It has been my, and I think there's
15 obviously a long track record of this, it's been my view that
16 given the situation and the (inaudible -static) of everybody's
17 interests with respect to this situation, that the Court should
18 decide these matters expeditiously as possible. So even though
19 this obviously has taken an enormous amount of time, and each
20 day my goal has been to have what issues can be decided,
21 decided as expeditiously as possible. And you know, that
22 continues to be my objective and that will continue to be what
23 I do in these situations.

24 Any settlement discussions have to take place in a
25 time frame that the Court is operating in and the only time I

1 alter that is when everybody involved in the litigation asks me
2 to hold off because they believe it would benefit everybody to
3 have the Court wait until the negotiations are complete. But we
4 obviously don't have that situation here. So I continue to
5 proceed as expeditiously as possible.

6 With respect to this underlying issue, I would just
7 note, the Government in its response letter first took the
8 position that although -- I should -- it's later in their
9 letter, but respect the threshold issue, that it's the
10 Government's view that even if, they dispute this, but even if
11 the Court were to determine that the -- it become my ruling
12 that the -- and the overall situation, that the undisputed
13 portion of the Bank's claim was \$176.7 million, that the
14 Government would still continue to pursue forfeiture of the
15 resort.

16 So I just note that to begin with, because that
17 obviously creates an issue because it was the belief based upon
18 the circumstances that the Government might withdraw any effort
19 to forfeit the property if that were the Court's determination.
20 But more fundamentally the Government disputes the \$176 million
21 amount. I won't go through their arguments, but the bottom
22 line is they believe that the undisputed claim would be at most
23 \$119 million, a little over \$119 million. They also believe
24 that the money that's been repaid on the additional loans, to
25 the extent the Court did determine after discovery and

1 additional argument that there was, with respect to the
2 additional loans, that the Bank was not a bonafide purchaser of
3 value and it was not an arm's length. That that money, they'd
4 be using the term, I guess, clawback, but it's the Government
5 argument that that money would be forfeitable in and of itself
6 because it should not have been removed from the resort in a
7 non arm's length transaction.

8 They also argue in a separate argument that it's a
9 violation, what occurred was a violation of the Court's
10 protective order. And I know, and I'll hear from Mr.
11 Kostolampros in a minute, I know the Bank has responses to all
12 that. There's a footnote 4 in their letter that outlines why
13 you believe some of the premises of the Government's argument
14 are factually incorrect. So I understand all that.

15 But the bottom line is, having reviewed these
16 submissions, it's my view that I should not -- I cannot
17 segregate what the Bank thinks should be the amount based upon
18 the initial loan and the PPF. And somehow reach an undisputed
19 number with respect to that without considering the issues with
20 regard to the additional loans and the possibility, and I
21 stress possibility, because obviously it has to be shown, that
22 the money from the additional loans somehow, because it's a
23 violation of the protective order, or because it's forfeitable
24 in and of itself, should operate -- should be essentially
25 operated as an offset to what the Bank believes it would be

1 entitled to under the initial loan and the PPF. I don't think,
2 I think it's too intertwined. I think there are plausible
3 arguments, again emphasizing if shown, that could require some
4 type of offset based upon my review of the papers.

5 So (inaudible) that the discovery on that issue,
6 although more limited than the Government sought in its
7 December 7th letter, which I'm going to address in a minute,
8 should proceed expeditiously and the Court should try to
9 resolve that issue. I'm not going to go too much into the
10 constructive trust argument at this point. But, and also the
11 Government doesn't take a position with respect to the third
12 party claimant argument with respect to that.

13 But part of that argument also could potentially
14 revolve around, not all of it, but it was part of it, around
15 the bonafide purchaser argument because the Bank's defense of
16 the constructive trust and the case law surrounding that does
17 obviously have that as an element with respect to overcoming a
18 constructive trust argument, at least in part. So I'm not
19 going to try to resolve that at this point, I don't think that
20 would even be productive or (inaudible) given the other issues
21 with respect to the Government. I'm going to hold that issue
22 in abeyance and obviously the third party claimants would be
23 entitled to review the discovery, the Government as well.

24 The last thing I'll say before I hear from everybody
25 is, it's my view, the Bank did put in its letter that, and I

1 want to discuss it, that they want to make a motion for an
2 interlocutory sale. I believe, I'm not even -- I still don't
3 quite understand, I'm asking Ms. O'Connor to explain to me, why
4 the Bank would even need to make a motion for an interlocutory
5 sale at this point, based upon what I'm reading, what I've
6 understood for a long time, and I thought the interlocutory
7 sale would go forward a year ago. But if the Government
8 prevails with respect to this forfeiture, the Government is not
9 going to run a resort. So it seems like everybody understands
10 that this resort needs to be sold. And I just don't understand
11 why, given all these issues with the ongoing -- the Bank having
12 to continue to carry the debt and have the resort continue to
13 be sort of, have this cloud hanging over its head, why the
14 Government does not consent to an interlocutory sale while
15 these remaining issues are being resolved. I don't understand
16 why that should await whatever the Court needs to do to resolve
17 these remaining issues. I continue to scratch my head at that,
18 because it's pretty clear to me that the Government is not
19 going to run a resort if it does prevail in whole or in part
20 with respect to the final order of forfeiture.

21 So in terms of the mechanism the Bank said in their
22 letter that it would be best done through the foreclosure
23 process. I don't, I can't claim to be, understand it
24 completely what the mechanism would be and what the best way of
25 doing that would be. But and the Bank proposed money could be

1 put in escrow awaiting the Court's ruling with respect to these
2 remaining issues.

3 So again I'm not necessarily weighing in on the
4 particular format with respect to it. But it's my strong view
5 that there should be an interlocutory sale of the property. If
6 the Government is not willing to agree to that I'm going to ask
7 the Bank to put in their written motion. And if I have the
8 discretion to do that under that these circumstances, I believe
9 it would be appropriate for me to exercise my discretion to
10 allow that to go forward to avoid any further harm to everybody
11 involved.

12 So that's another thing I wanted to address today in
13 light of the Court's rulings and views with respect to the
14 remaining portion of the forfeiture proceeding.

15 But Mr. Kostolampros, I'll hear from you first.

16 MR. KOSTOLAMPROS: Sure, Your Honor, thank you. Again
17 I'd like to at least raise some of our points as to why we
18 believe that the Government can't seek what it's doing here.
19 You know, again none of the case law that they've provided,
20 which they said they would, supports their theory.

21 They're now moving back two steps and claiming that
22 amounts paid to the, to the Bank, for amounts that it lent, and
23 that the Government knows was being lent and relent, are
24 somehow recoverable. Again, none of the cases that the
25 Government has provided supports this theory. The Government

1 has multiple opportunities to put in their forfeiture, the
2 proposed order of forfeiture, preliminary order of forfeiture,
3 what they believed was forfeitable and never did they assert
4 that amounts paid to Danske, which they were well aware of, was
5 potentially forfeitable.

6 And you know, Your Honor, several hearings back, and
7 you mentioned to the Government, you know, you never came to
8 the Court and said that there was anything improper as to
9 amounts being spent on the resorts.

10 THE COURT: I did read that and I thought about that.
11 I don't want you to think -- but they make some argument that
12 even though they were aware generally, obviously that the Bank
13 was continuing to fund the resort in some way, they're arguing
14 that they didn't understand what was going on with respect to
15 paying down interest as opposed to principal. That's sort of
16 behind the scenes what was going on. They did not understand
17 what was occurring that essentially the Bank was loaning money
18 and that the money is then being utilized to simply pay off
19 interest with no principal. But in any event, I understand the
20 argument.

21 MR. KOSTOLAMPROS: Yeah, but Your Honor, I mean that's
22 factually incorrect. You know, and I think there's still an
23 issue here as to, the Government is claiming that everything
24 that was repaid to Danske on the facility B and facility C, is
25 subject to basically setoff and apply to facility A. Well how

1 could that possibly be when the majority of those payments to
2 Danske are for, were for principal. So that means that Danske
3 advanced funds and got those funds back. If the Government is
4 coming back -- the only thing that I could see based on what
5 your ruling is here, is okay, subject -- the only thing that
6 could be potentially subject to setoff would be the interest.
7 And that interest is no where near the 90 million that the
8 Government is claiming that was potentially setoff.

9 Frankly that's probably under \$10 million. And I
10 think it's really important for us to get this straight here
11 because why are we going to prolong these proceedings which not
12 only has issues with, okay, determining Danske's claim, but
13 also what happens to the resort in the meantime when we're
14 figuring out who's got priority here and what the claim is.

15 Obviously yes, to move forward with an interlocutory
16 sale, but also, also you know, look, my client has spent
17 millions of dollars litigating this at this point in time. Has
18 advanced millions of dollars. And to continue to lend -- to
19 advance those funds, you know, in this proceeding, is just
20 frankly, when there may not be a need to ultimately because I
21 believe that when, if you take into account what potentially,
22 even under the Government's theory, what would be potentially
23 subject to setoff, it should only potentially be whatever
24 interest payment is.

25 Is the Government saying that amounts Danske actually

1 advanced under facility B and those amounts that were repaid,
2 that the Government somehow has, can seize and forfeit in this
3 proceeding? That strikes me as completely improper.

4 THE COURT: I think their argument, at least to the
5 parts that were advanced after the bill of particulars and the
6 Court's protective order, that I think their argument is that
7 money advanced after that date, it was not an arm's length
8 transaction, that that could be problematic. I don't -- or that
9 was paid I guess after that date on those facilities. So I
10 think that is their argument.

11 MR. KOSTOLAMPROS: But my understanding Your Honor,
12 what they're arguing is that it's proceeds traceable to the
13 DCSL resort. So those aren't monies traceable to the DCSL
14 resort. Those are monies that were paid by Danske to the
15 resort and Danske has a right to get those payments back,
16 otherwise it's, it's just an inappropriate taking at the end of
17 the day. Basically the Government is taking money from Danske
18 that is advanced for the resort.

19 THE COURT: Well I think the bottom line is, I
20 understand what you're saying. I understand that there are sub
21 arguments and sub issues with respect to what the Government is
22 claiming, factually and/or legally. But it's my view that, you
23 know, and I'm willing to, I spent this time trying to dig into
24 weeds to see if there's a way to resolve both legally and
25 factually, and I don't think it's a wise exercise for this

1 Court to endeavor. I was willing to try to embark on it. But
2 I don't even think it's in the Bank's interest that, it's in
3 the Bank's interest for the Court to resolve all these issue so
4 you don't have piecemeal litigation that goes on forever.

5 And I note that to the extent you're concerned, and
6 rightfully concerned about additional delay, that's why I want
7 to pursue the interlocutory sale. My view is if the Court were
8 to decide these issues today, that's what the Bank would do. So
9 what I'm suggesting is that the Bank hopefully, with the
10 Government's involvement and the Court's supervision, can
11 embark on that while these remaining issues are litigated. And
12 I'll emphasize again, I don't, I was going to tell the
13 Government, the December 7th letter that they put in and the
14 categories of things that they asked for in connection with
15 this issue, I thought were much too broad. I don't think that
16 we're talking about extreme long period. What I told the
17 Government initially when this came up, that they could take a
18 deposition, a video deposition. I'd give them some
19 documentation. But I don't anticipate that this is going to go
20 on and on and on like other phases of this case have.

21 So, all right, Mr. Kostolampros, let me just hear
22 from the Government and I'll come back to you. Ms. O'Connor, do
23 you want to respond to anything he said or for the Court's
24 ruling?

25 MS. O'CONNOR: Yes, Your Honor. Protective order was

1 entered (inaudible) coming to (inaudible) --

2 THE COURT: You're breaking up. I'm having trouble
3 hearing you.

4 MS. O'CONNOR: Sorry, Your Honor, is this better?

5 THE COURT: Yes.

6 MS. O'CONNOR: The Government wanted to point out,
7 Your Honor, that since the protective order was entered, and
8 the Court action started, Danske has been coming to the Court
9 beating a sense of urgency and despair, consistently uses this
10 (inaudible) to pressure, the Government to walk away from the
11 forfeiture. To sway the Court to expedite the ancillary
12 proceedings so that there won't be full discovery on Danske's
13 claim.

14 The truth Your Honor, is that the financial condition
15 of the resort is the same that it's been since Danske acquired
16 the (inaudible) in 2009. The resort has been in default since
17 that time. Danske stated in January 22nd letter to the Court
18 that the resort has not been in default since they acquired the
19 loan. But Danske's own records prove otherwise.

20 And the position the Government's been taking is that
21 because the resort was in default from the beginning, Danske
22 did not have to continue (inaudible) any new money as it said.
23 It could have foreclosed at that time. But it took advantage
24 of the situation and allowed the debt to (inaudible) through
25 and substantially consume the equity in the resort.

1 We filed a letter (inaudible) the Court with some
2 examples of if Danske had foreclosed years ago, how much equity
3 it would have made in the property. We think it's very telling
4 that it's not until now that the Court is pressing for
5 foreclosure (inaudible) all those years, a decade up until the
6 Government commenced the forfeiture, Danske didn't seek to
7 foreclose on the property.

8 But that being said, Your Honor, we would point out
9 to the Court that what Danske didn't tell the Court is that the
10 Government has been (inaudible) the idea of an interlocutory
11 sale (inaudible) in significant settlement negotiations that
12 contemplate an interlocutory sale.

13 Right now the parties are negotiating a sale that
14 would have certain safeguards to protect the Government and the
15 third parties. If Danske is given a free reign and conduct the
16 foreclosure that the Government is not involved in and the
17 third parties are not involved in, can sell the property for
18 whatever price it wants and to whomever it wants, including
19 Jowdy, and the Government has grave concerns that Danske
20 (inaudible) sale that's in the best interest of the Government,
21 third parties and victims --

22 (Background voices)

23 MS. O'CONNOR: Especially considering the Bank's prior
24 conduct. If Your Honor will recall, Danske was willing to let
25 Jowdy sell the San Marcos parcel to a friend of his for a

1 fraction of its value. So the Government strongly objects to
2 Danske's request to conduct an immediate foreclosure sale. But
3 that's why the Government has been trying with the third
4 parties to come to an agreement, a settlement, for an
5 interlocutory sale, which everyone agrees to the terms.

6 THE COURT: All right, well look, when I was proposing
7 an interlocutory sale, I was not suggesting the Government
8 would not be involved in it. I assumed given the situation and
9 the ongoing litigation, the Government would be involved in it.
10 But my view is that that has to be like, that has to be in
11 light again, in light of the Court's view that you know, the
12 case would need to proceed with some discovery, and additional
13 rulings by the Court, that it's important that that be the
14 focus of the Government, to get that in place so that it
15 doesn't continue to be damage under the circumstances.

16 So, you know, I don't know when would be a reasonable
17 time to hear back on what that proposal would be, but I don't
18 want too much time to go by. So --

19 MS. O'CONNOR: Your Honor, we've been actively
20 negotiating parameters of an interlocutory sale. Perhaps the
21 Government and the third parties (inaudible) circle back and
22 discuss an interlocutory sale that doesn't necessarily resolve
23 how the funds will be distributed but at least agree on the
24 terms of the sale that's mutually agreeable.

25 THE COURT: Has the Bank, has Mr. Kostolampros been

1 involved in these as well? Or is this just with the other
2 third parties?

3 MS. O'CONNOR: Counsel for CSL, counsel for Mr. Nolan,
4 and the Bank have been involved in these settlement.

5 THE COURT: All right. Let me just ask Mr.
6 Kostolampros.

7 MR. KOSTOLAMPROS: Sure, Your Honor, just to be clear,
8 I mean the discussions are over an overall resolution that
9 includes the sale of the resort property. Yes, we've had
10 discussions, the discussions have moved forward. But we have
11 not, you know, agreed in principle to a final, you know, term
12 sheet or anything like that yet.

13 But I can say, look, those discussions have moved
14 forward. And you know, again we've always been and remain open
15 to talking about a resolution.

16 But I would like to address at least one point that
17 the Government raised, is that the resort has been in default
18 since 2009. And as our papers say, that's not true. What has
19 changed and why the resort property is in default now, is that
20 was as of September 2019. When interest payments were not
21 made. At that point in time -- at every point prior to that
22 interest payments were being made. That's the reason why the
23 resort property is in default under the loan agreements now.
24 Prior to that there simply was not a default.

25 THE COURT: All right, let me just -- I want to hear

1 briefly from Ms. Ramachandran and/or Mr. Main, if they have
2 anything they want to add. Ms. Ramachandran.

3 MS. RAMACHANDRAN: Your Honor, are you asking if I
4 have something to add to the interlocutory sale discussion or
5 you know, in general to the points that Mr. Kostolampros raised
6 in his latest submission?

7 THE COURT: You can respond to anything you like to
8 respond to. Obviously as you heard, I'm going to hold off the
9 issue of the constructive trust argument that you raised
10 because I think you should try to resolve these other issues
11 first. But go ahead, you can say anything you wish to say.

12 MS. RAMACHANDRAN: Okay. I just, if I could just
13 briefly address, because we didn't put in a written response to
14 the Bank's latest letter on the constructive trust issue. If
15 that's okay with the Court.

16 THE COURT: Sure.

17 MS. RAMACHANDRAN: Okay, I just wanted to talk about
18 the issue of standing first. I mean there's the argument that's
19 been made that we don't have standing because we have interest
20 to an LLC. I think it's well settled law in the Second
21 Circuit, as well as the Eastern District and the Southern
22 District, that a constructive trust confers standing in a
23 forfeiture proceeding. So you know, there's a number of cases
24 I could cite. Some of them are already in the letter that we
25 put in. You know, Schwimmer (phonetic), Ovid (phonetic),

1 People's Benefit Life Insurance, and the point is that
2 standing, statutory standing in a forfeiture proceeding is just
3 another way of framing the question, does the petitioner have a
4 legal interest. And there are a bunch of cases out there
5 holding that where a constructive trust is recognized, you
6 know, it's (inaudible) out with whatever interest a petitioner
7 had and it confers equitable title and you have standing in a
8 forfeiture proceeding.

9 I would also note that, you know, that's an argument
10 that should have been made I think you know, earlier, in a
11 motion to dismiss. I think under the Rule 32.2, the Court
12 could have entertained that on a motion to dismiss, but once
13 the Bank has moved for summary judgment, which it has, I think
14 it's forfeited that standing argument.

15 I also just want to briefly address the argument that
16 Danske is making that their status as a bonafide purchaser for
17 value defeats our constructive trust claim. And I think, you
18 know, there's a misunderstanding about what law applies here.
19 State Law governs the issue of whether a petitioner has a legal
20 interest at all. And here that State Law, as we set forth in
21 our letter, is Delaware Law. And I think we meet the elements
22 for a constructive trust under Delaware Law.

23 You know, I didn't see any arguments that Danske
24 made, factual or legal, challenging our assertion of a
25 constructive trust to begin with.

1 But the forfeitability of the property is actually
2 governed by Federal Law. It's governed by the Federal
3 Forfeiture Statute, 21 USC 853. The cases cited in their
4 brief, they don't have anything to do with forfeiture. You
5 know, the forfeiture statute, you know, it looks to when and
6 how a petitioner acquired its interest. And I think here our
7 argument is that CSL and Mr. Nolan have a superior interest
8 under 853 and 6(a).

9 You know, if Your Honor will recall, there's two ways
10 you can prove an interest under 853 and 6, the first is that
11 you have a superior right, title or interest, and that interest
12 renders the order of forfeiture invalid or in whole or in part,
13 because the interest is superior to that of the defendant or
14 the Government.

15 The second way is a bonafide purchaser for value. We
16 recognize that superior in the statute means superior to the
17 defendant, but it's also superior to the Government. Because
18 the effect of a constructive trust is actually to invalidate
19 the forfeiture as to that portion, as to it whole or in part.

20 And here our argument is that Mr. Kenner, Phil
21 Kenner, he didn't have the authority to sign over our equity
22 interest to Lehman (phonetic) or Danske, or anybody else. The
23 beneficiaries of the constructive trust here, they didn't enter
24 into the mortgage. They were really deprived here of any right
25 to control the equity or decide what happened to it.

1 So you know, the argument that they somehow consented
2 to this and that's why, you know, bonafide purchaser claim
3 should trump that of a superior interest holder under the
4 statute, I don't think that you know, works.

5 You know, even if you believe that Danske is a
6 bonafide purchaser for value, and I understand the Court
7 disagrees with us, we don't think they are. You know, at least
8 we don't think they have proven that, carried their burden to
9 prove that on summary judgment. You know, it only vested after
10 the Government acquired its interest.

11 And I think any other interpretation of this statute
12 would essentially let a defendant go commit a fraud, take
13 somebody else's money, and then either sell it to somebody
14 else, mortgage the property, and really, you know, leave the
15 victim with absolutely no recourse.

16 Under the forfeiture statute 853(o), it says the
17 provisions of this section shall be liberally construed to
18 effectuate its remedial purposes. And I think here the only
19 reading that could effectuate the remedial purpose, which is to
20 not let a defendant profit from his crimes, would be to read it
21 this way. That you know, the cases are clear that a
22 constructive trust does confer a superior interest under the
23 first prong of the forfeiture statute. And in this case, you
24 know, that interest is superior to that of Danske as a bonafide
25 purchaser.

1 And I just also just want to make clear, there was
2 some back and forth in the correspondence about you know, that
3 I somehow think they don't have a claim because I'm trying to
4 settle this case, which you know, couldn't be further from the
5 truth. I think myself and Mr. Main on behalf of CSL, you know,
6 we very much want to reach a resolution here and we have been
7 trying to do that. We heard the Court loud and clear that a
8 resolution would be in the interest of everybody here.

9 But I think what's happening is that the Bank is
10 arguing that their claim should come first. Which really has
11 the practical effect of extinguishing everybody else's claims.
12 And what we are arguing is that, not that they don't have a
13 claim at all or they don't have an interest, but that we should
14 come first. And you know, our claims in the end are just a
15 small slice of what's at stake here. It would still allow very
16 substantial recovery for Danske.

17 So I just, you know, want to make clear to the Court
18 that we are trying to settle this. We very much hope that we
19 can reach a resolution. But we also need the Court to
20 recognize our interest as a constructive trust. You know, that
21 is an equitable remedy. And I believe the Court is empowered to
22 recognize it here.

23 And just speaking for Mr. Nolan, you know, usually
24 victims don't have to do this. They don't have to hire their
25 own counsel. But you know, given a situation where you know,

1 he's trying to recoup some of his millions of dollars in
2 losses. You know, this isn't -- unfortunately this hasn't been
3 a case where the Government has been able to you know, reach a
4 settlement that takes care of the victims. You know they have
5 an obligation to do that under the MVRA. And that for all
6 kinds of reasons, the length of this litigation, it just hasn't
7 happened. And that's really you know, the core interest that we
8 have here and that's why we're making the constructive trust
9 argument.

10 THE COURT: All right, let me just make sure I
11 understand. Mr. Kostolampros, first of all, the negotiations
12 that are going on, if there was a resolution, it would be a,
13 not just a resolution in terms of moving forward with the sale,
14 it would be a resolution of the whole matter, including the
15 outstanding issues with, that I've identified. Is that, is my
16 understanding correct?

17 MR. KOSTOLAMPROS: That is right, Your Honor. Our
18 negotiations concern the whole matter that would resolve the
19 forfeiture proceeding. Or this aspect of the forfeiture
20 proceeding.

21 THE COURT: All right, so let me just ask you first,
22 and then I'll see if anybody objects. So what do you want the
23 Court to do in terms of -- I'm prepared to, I wasn't going to
24 do it today, I was going to ask the Government to narrow their
25 discovery request from that December 7th letter, and then make

1 rulings to the extent that the Bank was, I assume the Bank,
2 whatever they narrow it to, was still going to have some
3 objections. But do you want me to set a schedule for moving
4 that forward, or do you want me to await a certain period of
5 time to see if you can resolve --

6 MR. KOSTOLAMPROS: I think -- go ahead.

7 THE COURT: No, go ahead.

8 MR. KOSTOLAMPROS: From our perspective, I think
9 anywhere between ten days to two weeks to allow the parties
10 time to either, to move forward with their discussions and get
11 an agreement in principle. Otherwise move forward with the
12 Government submitting a plan for an interlocutory sale, and
13 also the discovery, the limited discovery that you allow, that
14 you ordered or allowed I should say. So allow us, I think ten
15 to 14 days to come back to the Court and provide a status as to
16 where we are. And frankly, you know, if we can't move forward
17 with an agreement in ten days or two weeks, then a sale needs
18 to go forward, and the limited discovery as well.

19 THE COURT: All right. That's acceptable to me. Does
20 anybody have any objection to that schedule? All right. I
21 don't hear any objection. So I'm going to ask two weeks, Mr.
22 Kostolampros, I'll let you put in the letter in two weeks
23 advising me of what the situation is. Again, because the Bank
24 is the one, you bear the brunt of the additional discovery and
25 providing additional discovery, and the deposition. If you

1 believe in two weeks that it's close enough that you don't want
2 to start embarking on that discovery, and everybody else is on
3 the same page, again, if everybody is in agreement, then I'm
4 not as concerned. But if after two weeks it appears that a
5 resolution is not going to be reached, or it's not going to be
6 reached any time soon, then you can consult with everybody
7 else, and maybe there will be an agreement of what I'm going to
8 want if there is no resolution, I'm going to want the
9 Government to put in another letter narrowing its discovery
10 request to what I think would be a more reasonable request in
11 terms of you know, understanding, litigating the issue of
12 whether or not these transactions were at arm's length.

13 And also in that same submission, the Government, I
14 want the Government to tell me why I do not have the discretion
15 at this point to order an interlocutory sale while preserving
16 everybody's legal rights and whatever monies would be
17 recoverable based upon the Court's rulings.

18 So if you don't reach a resolution within two weeks
19 and you want to move forward on that, the Government and the
20 other lawyers can figure out a date for the Government to make
21 that submission. And the Bank would then obviously respond to
22 that. Anybody else who want to respond to that. And we'd have
23 a conference call after that for me to rule on the scope of the
24 discovery, timing of the discovery, and on the interlocutory
25 sale issue.

1 Does that make sense, Mr. Kostolampros?

2 MR. KOSTOLAMPROS: Yes, Your Honor.

3 THE COURT: All right. Anybody else -- I did, there
4 was one thing, Mr. Skovgaard is on the line. I know Mr.
5 Wolinsky put in the letter. There was a request in Mr.
6 Wolinsky's letter for the appraisal from many years ago. What's
7 the Government's position on that?

8 MS. O'CONNOR: Yes, Your Honor, the Government's
9 position is that, well to begin with, Wolinsky and the ad hoc
10 committee have (inaudible) remind the Court they don't have
11 standing in this action. But in any (inaudible) the
12 Government's position was that it would not continue to pursue
13 the forfeiture of the resort (inaudible) Danske's entire
14 (inaudible) is recognized. Unlikely we'd move forward
15 (inaudible)

16 However at this point the entire claim has not been
17 recognized (inaudible) Government would move forward
18 (inaudible) been obtained that there would be equity at this
19 point. So why the Government (inaudible) and we don't believe
20 that there's any purpose for unsealing the appraisal. It's
21 still Government work product. It doesn't serve any purpose.

22 THE COURT: All right. I'm going to hold that motion
23 in abeyance. I'll just say with respect to that appraisal, and
24 I have to go back and look at the entire circumstances, but
25 it's my recollection, because it was a while back, but the

1 Court, the question I guess on this issue is whether or not
2 it's a judicial document or not. Whether it's something that
3 the public and/or parties should have -- the public I guess,
4 whether they're a party or not, should have access to something
5 that was submitted to the Court under seal.

6 My recollection with respect to that was that that
7 appraisal was not submitted to the Court in connection with the
8 Court making any determination with respect to the case. I
9 actually remember the surprise actually to have received it
10 because the whole point of that appraisal, and my urging, which
11 I did, the Government to do the appraisal, was the Bank
12 basically saying that there was not sufficient equity based
13 upon what their view was of their interest for the Government
14 to pursue this. And they wanted the Government to try to
15 verify that fact. And I urged the Government to do that, and
16 the Government did that.

17 So, but I don't believe I made any determination
18 based upon that appraisal. I wasn't waiting for it, I wasn't
19 making any decision with respect to it. I think the Government
20 just submitted it to me because there was a discussion about it
21 and they wanted to, I guess to show me that they had done it.

22 But, so I don't believe under the standard of what a
23 judicial document is that we have a presumption of public
24 access that that under those circumstances would apply. So at
25 least at this juncture I'm not going to unseal it. But I guess

1 I will revisit that down the line if circumstances make it
2 clear to me that the Court, something about that appraisal, the
3 Court is relying on that appraisal in some way, which I have
4 not done to date.

5 All right, any other issues anyone needs to raise
6 with the Court today?

7 MR. SOUTHER: Judge, this is Tom Souther, just on the
8 appraisal point if I may.

9 THE COURT: Yes.

10 MR. SOUTHER: I just would like to remind the Court,
11 so the appraisers visited the property in November of 2019, and
12 the appraisal was issued in January of 2020. And just to state
13 the obvious, it was prior to the pandemic. So at this point
14 any reliance on the appraisal I think would have to be
15 dramatically discounted or discarded because the resort and
16 hospitality and travel and restaurant industries are among the
17 industries that have been most adversely affected by the
18 pandemic.

19 So to the extent the Government keeps pointing to
20 that appraisal as a reflection of, oh, there's significant
21 value in excess of the Bank's claim, I think that's something
22 that I would encourage the Government to go back and revisit
23 with its appraiser, because the circumstances have changed
24 dramatically, so the calculations I think have changed
25 dramatically.

1 THE COURT: All right, I mean I thought about that
2 too, and it's a valid point. But I guess at this point I'm just
3 trying to comment on why based upon the Government's prior
4 submissions to the Court back when, why I didn't think it
5 should be publicly available. But in terms of any, its ongoing
6 utility, obviously it's a valid point and I assume the
7 Government is aware of that as well.

8 All right, anybody else?

9 MR. SKOVGAART: Mr. Skovgaard, can I just comment on
10 that point?

11 THE COURT: Yes.

12 MR. SKOVGAART: Even if it is not a judicial document
13 -- if it is a judicial document it's only a common law
14 presumption of asset (inaudible) to this. But the Government in
15 addition has to show good cause to continue the protection of
16 the appraisal. And it has to show that the appraisal contains
17 the Government trade secrets or confidential commercial
18 information.

19 The appraisal is based on documents and information
20 provided by Diamante. And in particular its financials and
21 cash flow. So on behalf of the homeowners we again request the
22 appraisal be released. Releasing it now would let all the
23 parties know that are prolonging the process, there's likely to
24 be (inaudible) or as we believe much more likely a waste of
25 everyone's time and a source of even further delay in getting

1 the project recapitalized.

2 THE COURT: All right, again I'm going to ask the
3 Government, if there is not a resolution of this within the
4 time period, this two week period, I'll ask the Government in,
5 I'll set a date for them to respond in writing to your, the
6 arguments you made in the letter. But at least at this point I
7 don't think it's necessary to resolve that right now.

8 Okay. Anybody else? All right. So I'll wait to
9 hear, obviously if any issues come up in the interim, you can
10 always write me a letter and the Court will be available, all
11 right? Thank you everybody, have a good day.

12 * * * * *

13 **C E R T I F I C A T I O N**

14 I, **PATRICIA POOLE**, court approved transcriber,
15 certify that the foregoing is a correct transcript from the
16 official electronic sound recording of the proceedings in the
17 above-entitled matter.

18

19 /S/ PATRICIA POOLE

20 TRACY GRIBBEN TRANSCRIPTION, LLC DATE: February 2, 2021

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